

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES of AMERICA,

Plaintiff,

v.

LEN BLAVATNIK,

Defendant.

Civil Action No. 1:15-cv-01631-RDM

**ORDER FOR FURTHER BRIEFING**

This matter is before the Court on the government's Motion for Entry of Final Judgment. The United States and Defendant have stipulated to entry of a Final Judgment providing for the payment of a civil penalty of \$656,000 by Defendant Len Blavatnik pursuant to Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), which is the premerger notification provision of the Hart-Scott-Rodino Act. That provision requires notification to the Department of Justice and the Federal Trade Commission and observation of a waiting period before completing certain acquisitions of voting securities or assets. This premerger notification requirement facilitates the agencies' ability to detect and prevent antitrust violations before they occur.

The United States asserts that the procedures for reviewing a proposed consent judgment pursuant to the Antitrust Procedures and Penalties Act, also known as the Tunney Act, do not apply because the complaint and proposed Final Judgment seek only the imposition of a monetary penalty. In a single paragraph, the United States asserts that, unlike an injunctive decree, a judgment requiring the payment of civil penalties will have no competitive impact on others or the public at large; that the legislative history of the Tunney Act does not evidence any congressional intent to require notice and an opportunity for public comment on a decree solely

imposing civil penalties; and that, in numerous cases, courts have approved Hart-Scott-Rodino civil penalty settlements without requiring compliance with the Tunney Act. Dkt. 1-4 at 3.

The Court concludes that further briefing on this issue is warranted. Notably, none of the cited decisions include any discussion of whether and when the Tunney Act applies. It is also unclear whether the scope of the Act is constrained in the manner the United States asserts. Although it undoubtedly provides an opportunity for the public and the Court to consider the competitive impact of an antitrust settlement, the Act was also intended to serve the broader purpose of preventing “‘judicial rubber stamping’ of the Justice Department’s proposed consent decree” and to ensure that a reviewing court could “‘make an independent determination as to whether or not entry of a proposed consent decree [was] in the public interest.’” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995) (internal citation omitted). Certain provisions of the Tunney Act, moreover, were arguably intended to promote transparency in the negotiation and entry of antitrust consent decrees. *See Note, The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 Colum. L. Rev. 594, 626-28 (1973). The Act, for example, requires “each defendant” to “file with the district court a description of any and all written or oral communications by or on behalf of each defendant . . . with any officer or employee of the United States concerning or relevant to” the proposed consent judgment, with the exception of communication of counsel of record with “employees of the Department of Justice.” 15 U.S.C. § 16(g).

At the same time, the Court recognizes that much of the legislative history of the Tunney Act is directed at the entry of “consent *decrees*,” H.R. Rep. No. 93-1463, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6536; S. Rep. No. 93-298, at 5 (1973),—although the Act itself speaks in terms of “consent *judgments*”—and “consent decrees” might be understood to

contemplate a court order requiring continuing judicial supervision and not merely the payment of money. In addition, the United States is correct that aspects of the Tunney Act, such as the required “competitive impact statement” and required “description of the procedures available for modification of” the proposed consent judgment, 15 U.S.C. § 16(b), are likely inapplicable to purely monetary judgments. The Court further recognizes that the public interest in full disclosure and the opportunity to comment on the type of procedural violation of the Hart-Scott-Rodino Act at issue in this case is arguably more limited than, for example, violations of Sections 1 or 2 of the Sherman Act, especially in the absence of a private right of action to enforce the premerger notification requirement.

In light of these considerations, the Court would benefit from further briefing on this issue. The parties, accordingly, are **ORDERED** to file supplemental briefs addressing why the procedures set forth in the Tunney Act do not apply to the proposed Final Judgment in this action. In light of the apparent agreement of the United States and Defendant that the Tunney Act does not apply, moreover, interested *amici*, if any, may also file briefs addressing the issues raised in this Order. The parties’ briefs and any *amicus* briefs shall be filed on or before November 20, 2015. This order is also being filed in UNITED STATES OF AMERICA v. LEUCADIA NATIONAL CORPORATION, No. 1:15-cv-01547-RDM, which concerns the same issue. The government may file a single brief in both cases.

**SO ORDERED.**

/s/ Randolph D. Moss  
RANDOLPH D. MOSS  
United States District Judge

Date: October 19, 2015